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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 880

WILLIAM LEV and BENJAMIN DANIS,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above named petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of conviction after a trial by jury in the United States District Court for the Southern District of New York.

Opinions Below

There was no opinion rendered in the District Court. The opinion of the Court of Appeals is not yet reported and is set forth in the Appendix, *infra*.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on March 23rd, 1960. No application was made to that Court for re-hearing and no application was made for an order granting an extension of time within which to petition for certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented for Review

(1) Whether the Trial Court committed prejudicial and reversible error in permitting the Government to read to the jury portions of two extra-judicial, post-conspiracy statements, not in evidence, made by Giuseppe Battaglia, a co-defendant and co-conspirator, who had pleaded guilty and was not on trial.

(2) Whether the Trial Court committed prejudicial and reversible error in failing to rule, as a matter of law, that petitioner Danis had withdrawn from the conspiracy at the time of his transfer to Idlewild Airport.

Statutes Involved

The statutes under which the petitioners stood trial are as follows:

"Title 18, Section 213, United States Code. Acceptance or demand by customs officer or employee.

Whoever, being an officer or employee of the United States, solicits, demands, exacts, or receives from any person, directly or indirectly, except in payment of the duties or exactions fixed by law, any gratuity, money, or thing of value, for any service performed

under the customs laws, or in consideration of any official act or the omission thereof, in connection with or pertaining to the importation, entry, inspection or examination, or appraisement of merchandise or baggage, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Evidence, satisfactory to the court, of such soliciting, demanding, exacting, or receiving shall be *prima facie* evidence that the same was contrary to law."

"TITLE 18, SECTION 371, UNITED STATES CODE. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"TITLE 18, SECTION 545, UNITED STATES CODE. Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in

any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term 'United States', as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Gaum. (As amended Aug. 24, 1954, c. 890, Sec. 1, 68 Stat. 782; Sept. 1, 1954, c. 1213, title V, Sec. 507, 68 Stat. 1141; June 30, 1955, ch. 258, Sec. 2(c), 69 Stat. 242.)"

"TITLE 18, SECTION 2, UNITED STATES CODE. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (As amended Oct. 31, 1951, c. 655, Sec. 17b, 65 Stat. 717.)"

The construction, purpose and effect of Title 18 United States Code, Section 3500 is directly involved in question No. 1 presented by this petition, *supra*, and reads as follows:

Sec. 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States

and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the intrests of justice require that a mistrial be declared.

(e) The term "statment", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Statement of the Case

The petitioners herein appealed in the first instance from a judgment of the United States District Court for the Southern District of New York rendered on October

28th, 1959 convicting them each on one count of conspiracy (18 U. S. C. Section 371), with defendants Guarna and Battaglia to defraud the United States in its operation of the Customs Service by smuggling merchandise into this country. In addition, petitioner Lev was convicted on nine counts of smuggling (18 U. S. C. Section 545) and twelve counts of soliciting or receiving bribes (18 U. S. C. Section 213). Petitioner Danis was additionally convicted on one count of smuggling and three counts of soliciting or receiving bribes. Trial was had before the Hon. George H. Boldt, D. J., and a jury, commencing on September 28th, 1959 and concluding on October 24th, 1959. Each petitioner was sentenced to three years imprisonment on the conspiracy count and two years imprisonment on each substantive count, the said sentences to run concurrently. A fine of $2,500 was also imposed upon each petitioner.

The indictment filed on April 15th, 1959 originally contained thirty-one counts and named eight defendants.*

The petitioner and four other defendants, Arthur B. Mandel, Theodore Rider, Joseph Cohen and Robert S. Rosenberg, were customs inspectors assigned to duty in the New York City area at the times set forth in the indictment. The two remaining defendants, Domenico Guarna and Giuseppe Battaglia were salesmen and importers of Italian men's wear, with offices in New York City.

Battaglia and Guarna pleaded guilty prior to trial and were the Government's principal witnesses. The Govern-

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* Prior to trial, defendants Mandel, Rider, Rosenberg and Cohen and petitioner Danis moved for a severance of their trials from that of petitioner Lev. The motion was denied as to Danis and granted as to the remaining defendants. Counts twenty-eight through thirty-one, which charged each of the other four defendants with conspiracy, respectively, were therefore severed from the indictment on which the petitioners stood trial. In addition, counts twenty-five and twenty-six which charged Lev and Mandel, respectively, with illegally receiving and concealing a quantity of distilled spirits, knowing same to have been imported into the United States in violation of 18 U. S. C. Section 545, were severed prior to trial and were subsequently dismissed.

ment's case rested almost exclusively upon their testimony which provided the only direct evidence against the petitioners.

According to their testimony, petitioner Danis first proposed the smuggling scheme to Battaglia and Guarna at their office some time in January, 1954. He offered to arrange to have their merchandise passed through customs without payment of the required duty, in exchange for a share of their savings to be effected thereby. This proposal was rejected by Battaglia as not practicable inasmuch as he only brought samples of little commercial value into this country (R. 93).

A few days later Danis returned to their office accompanied by Lev and the proposal was once again made to the importers. Battaglia replied that he could not see any future in it, but would think it over (R. 94, 95).

Before Battaglia returned to Italy in July, 1954, he and Guarna decided between themselves to test the scheme by attempting to smuggle in Battaglia's collection of samples upon his return (R. 96, 97).

Shortly before Battaglia's return in January, 1955, Guarna contacted Danis and informed him of Battaglia's impending arrival. Danis was thereafter present at Pier 84, North River, when Battaglia returned and inspected his baggage, permitting him to bring in the collection of samples without declaring them or paying duty (R. 97-102).

A few days later both petitioners came to Battaglia's office and Danis was paid $100 or $150. Danis at that time told the importers that he was being transferred to duty at Idlewild Airport and suggested that they bring in merchandise by air, but Battaglia rejected the idea as being impractical because of the weight of the merchandise and the cost of air freight (R. 106).

Danis was thereafter transferred to the airport and was never again contacted by either Battaglia or Guarna. On cross-examination Battaglia testified that after the January, 1955 entry Danis "was out of the piteure because he was at the airport already. . . . He was never anymore with us. I never saw anymore Mr. Danis because he went to the airport to work with the airport" (R. 417, 418, 770).

The nine other smuggling offenses charged in the indictment occurred between September, 1955 and October, 1957 at Pier 84, North River and in no way involved petitioner Danis.

Some time in December, 1955, however, a customer of Battaglia and Guarna, named Longhi, was scheduled to arrive at Idlewild Airport from Italy to attend a trade exposition. Guarna testified that he contacted petitioner Lev who in turn telephoned petitioner Danis to help Longhi through customs at the airport inasmuch as he spoke no English. Danis was not scheduled to be on duty at the time the plane was due to arrive and he arranged with another inspector to expedite Longhi through customs. Guarna went to the airport but because of inclement weather the plane went on to Philadelphia without stopping at Idlewild (R. 88-850, 853).

Guarna repeatedly testified that there was no intention to smuggle in merchandise into this country on this occasion and that all he was seeking to accomplish was to assure courteous and expeditious treatment to his customer.

A few days or weeks after this occurrence, Danis came to the office of Battaglia and Guarna and that was the only time either of the importers had any contact with him again after January of 1955 (R. 1293, 1624-1632).

Danis' counsel repeatedly objected to any conspiracy testimony being admitted in evidence against the said

petitioner with reference to events subsequent to his transfer to airport duty in May, 1955 (R. 138, 144, 149, 175, 176, 180, 185, 194, 228). These objections were overruled by the Court.

According to Battaglia and Guarna, all further smuggling operations after the January, 1955 entry, were conducted through petitioner Lev. On four of the nine additional occasions of smuggling charged in the indictment, Lev himself inspected the baggage and permitted its entry without exacting the required duty. On four other occasions, each of the other customs inspectors named as defendants, inspected the baggage being brought in by Battaglia or Guarna, or someone on their behalf, as per arrangements made by Lev, with the exception of the December, 1955 entry involving inspection by the defendant Rider.

On that occasion Rider apparently inspected Battaglia's baggage and permitted him to pass customs without payment of the required duty in the absence of any pre-arranged understanding with Lev (R. 139-148).

Thereafter Rider came up to the importers' office and was paid by them (R. 152). While Rider was still in the office, Lev came up and the two inspectors met there. Lev was also given a payment after Rider had left (R. 152, 153).

On the ninth and last occasion of smuggling, October 1st, 1957, Guarna was arrested after he was passed through customs by an inspector named Coughlin, without making the required payment of duty on his merchandise (R. 990).

Battaglia, who was at that time in Italy, returned to the United States on October 15th, 1957 and was arrested on that same day (R. 233, 234).

The testimony of Battaglia and Guarna was replete with material contradictions and inconsistencies. They differed with each other in their testimony as to many aspects of the same events. Their testimony at the trial also differed materially in several important respects with their own pre-trial statements. These discrepancies pertained to times, places, identities of inspectors who performed the baggage examinations, accounts of events which occurred during the said examinations, the times and circumstances of alleged payments and amounts of payments. In almost every instance the amounts of payment testified to by the importers on the trial were materially higher than the amounts set forth in the indictment. With respect to several of the alleged payments, two and three different amounts were testified to at different times by each of the said Government witnesses, with respect to the same alleged incidents of payment.

Both petitioners steadfastly maintained their innocence at all times. Their testimony was unshaken in cross-examination. Testimony of Government witnesses established that the petitioners had no possible way of knowing that they would be assigned to baggage inspection at Pier 84 until the afternoon preceding the arrival of the vessel and had no possible way of arranging their assignments beforehand. Even upon arrival for duty at the Pier, the petitioners did not know the particular class of baggage inspection to which they would be assigned until moments preceding the actual docking of the vessel (R. 653, 2498, 2534).

Petitioner Lev was a personal friend of Guarna during the time of the alleged smuggling operation and it is undisputed that they took a trip together to Canada in Guarna's automobile in November, 1956 (R. 1980-1982). It was further undisputed that petitioner Lev's wife had loaned $2,500 to Guarna in 1956 (R. 2032-2036), and the

vast bulk of the alleged bribery payments to Lev were made at the same time that Guarna was making repayment of the said loan to the said petitioner.

Petitioner Lev's contention that it was a common practice for inspectors to give "immediate attention" on the piers to personal friends and friends of other inspectors, but that this practice did not in any way connote any unlawful conduct; was confirmed by testimony of the Government witness Esposito (R. 661-667).

Petitioner Danis was employed by the Customs Service since 1928 (R. 3026) and petitioner Lev was so employed since 1939 (R. 1924). Government witnesses testified that neither had ever been found to be remiss in his duties, nor had either ever made a special request to be assigned to any pier (R. 2469-2542).

Reasons for Allowance of Writ

The opinion of the Court of Appeals in the instant case conflicts with applicable decisions of the Supreme Court of the United States and with applicable decisions of Courts of Appeal of other Circuits, on the same matter, in several respects. It is also submitted that at the very least, the decision of the Court of Appeals has decided an important question of federal law with respect to the admission of post-conspiracy statements which has not been, but should be, decided by this Court. It is further submitted that the instant decision of the Court of Appeals, if permitted to stand, would emasculate the spirit and purpose of Title 18, U. S. C., Section 3500, as the said statute has been construed by this Court. In the succeeding argument, undersigned counsel will present a concise elaboration of the reasons herein set forth.

ARGUMENT

QUESTION NO. 1

Whether the trial court committed prejudicial and reversible error in permitting the Government to read to the jury portions of two extra-judicial, post-conspiracy statements, not in evidence, made by Giuseppe Battaglia, a co-defendant and co-conspirator, who had pleaded guilty and was not on trial.

Prior to Battaglia's testimony on direct examination, the Government, pursuant to Section 18 U. S. C., Section 3500 delivered to petitioners' counsel copies of two question and answer statements which he had made to customs agents after his arrest on October 15th, 1957. The first statement was taken on October 16th, 1957 and was marked Government's Exhibit "12" for Identification. The second statement was taken on November 21st, 1957 and was marked Governments Exhibit "13" for Identification. Neither of these statements was admitted into evidence. On cross-examination counsel for both petitioners used Exhibit "13" for Identification in an attempt to impeach Battaglia's testimony pertaining to specific events to which he had testified on direct. Counsel for petitioner Lev read a series of questions and answers from the said exhibit to the witness with respect to events that occurred after Battaglia's December, 1956 entry, subsequent to his inspection at the Pier by the defendant Rosenberg. The said questions and answers related solely to the question of payment made to petitioner Lev on that occasion and contained no reference to any of the events which occurred on the Pier (R. 456-463). Counsel for petitioner Danis read one question and answer to the witness from Exhibit "13" pertaining to whether payment had been made to petitioner Lev on behalf of himself and the defendant Rider following Battaglia's December, 1955 entry (R. 560).

On re-direct examination of Battaglia, the Government read to the jury, over repeated objections, portions of both Exhibit "13" for Identification and Exhibit "12" for Identification (R. 568-573).

The portions so read did not contain any matter which in any way qualified or clarified any of the testimony which had been read to the witness by petitioners' counsel on cross-examination.

The portion of Exhibit "12" for Identification which the Government read to the jury all related to matters which occurred during Battaglia's entry of December, 1956, while he was still at the Pier. The question of payment was not in any way involved in the matter so read. Under the guise of the "Doctrine of Completeness" which the Government relied upon for the introduction of this evidence (R. 572) the following post-conspiracy statements of Battaglia from Exhibit "12" for Identification were admitted with reference to his entry of December, 1956:

(1) He went onto the pier and spoke to Guarna who pointed out to him the inspector who was going to examine his baggage;

(2) That he began to worry because this inspector was treating him like any other "customer" and he told Guarna to call petitioner Lev or he would declare everything;

(3) That petitioner came over and told Battaglia: "Don't worry, this man is dealing with us";

(4) That Battaglia was still worried because the man (Rosenberg) told him to open everything since as soon as the baggage was opened everybody could see what kind of merchandise was in the trunks;

(5) That Battaglia was still worried because he noticed activity taking place in the area that he had never seen before;

(6) That he was told that "they were looking for somebody else under my letter 'B' " in connection with drugs or narcotics;

(7) That petitioner again told him: "Don't worry, everything is all right";

(8) That thereafter the trunks were closed and the inspection was ended;

(9) That Rosenberg "knew about it" and "sometime it seemed to me he did not know anything but he was doing a favor to Mr. Lev";

(10) That all the trunks were opened in the inspection;

(11) That it was obvious that the trunks contained merchandise (R. 569-571).

With respect to Battaglia's entry in December, 1955, the following post-conspiracy utterances of Battaglia from Exhibit "13" for Identification, were admitted:

(1) That he paid petitioner Lev the sum of $300;

(2) That he had paid something to Rider;

(3) That he did not know how much Rider was going to get from petitioner.

(4) That he had the impression that when petitioner didn't do everything by himself, he was getting most of the money (R. 568, 569).

Petitioners' counsel made timely objections to the admission of such evidence, which objections were overruled (R. 568, 569). The Court had previously ruled that any objections by one petitioner inured to the benefit of the

other insofar as it might relate to the conspiracy count (R. 145).

Peitioners' counsel immediately moved the Court for a mistrial but this motion was similarly denied (R. 574, 575).

It is undisputed that both Government's Exhibits "12" and "13" for Identification contained statements made subsequent to the termination of the alleged conspiracy and were not in furtherance of its objects. As such they were clearly inadmissible as evidence. (*Brown* v. *United States*, 150 U. S. 93; *Logan* v. *United States*, 144 U. S. 263; *Krulewitch* v. *United States*, 336 U. S. 440.)

In the *Krulewitch* case this Court dealt with the scope of the co-conspirators' exception to the hearsay rule. It stated that as a prerequisite to admissibility the statements made by one co-conspirator to be used against another must be made in furtherance of the conspiracy charged. It refused to expand what it termed "'this narrow exception to the hearsay rule".

It is respectfully submitted that the instant decision of the Court of Appeals is thus in conflict with the applicable decision of the *Krulewitch* case by this Court. The said decision of the Court of Appeals, if permitted to stand, would constitute an expansion of the "narrow exception" to an extent that would be limitless once the defense uses a post-conspiracy statement obtained under Section 3500 for impeachment purposes. At the very least, the Court of Appeals decision in the instant case enunciates a further exception to the rules of evidence pertaining to the admissibility of post-conspiracy statements which has not been, but should be, considered by this Court.

As hereinabove set forth, the portions of Battaglia's post-conspiracy statements which the Government read to the jury on cross-examination in no way qualified, clarified or explained the portions of the said statements read to the witness on cross-examination.

The "Doctrine of Completeness" was therefore improperly utilized by the Government in violation of its proper limitations. (See *Wigmore, Evidence,* 3rd Ed. 1940, Section 2113, pp. 523-525.)

Indeed, with respect to the December, 1956 entry, the Government did not read from the same statement used on cross-examination, but read from a different statement which was taken thirty-six days previously.

To uphold the Government's right to invoke the said Doctrine for the purpose of and in the manner in which it did, in the instant case, would completely emasculate the spirit and purpose of Title 18, United States Code, Section 3500.

The Government's contention that when a report or statement is produced pursuant to the provisions of Section 3500 and is made use of for the purpose of impeaching the credibility of the witness, that in such case under the "Doctrine of Completeness" it may proceed to read into evidence, without offering the statement, such other portions as it may desire, is patently without merit.

To lend support to this conspiracy concept, renders the purpose of Section 3500 wholly abortive. No competent trial counsel, except in the most unusual circumstances, would ask for the production of statements and reports made by Government witnesses as he is now entitled to do under Section 3500, and employ them for the purpose of cross-examination if, at the same time, he would thus be opening the door to either the admission of the statement as a whole or in part under the "Doctrine of Completeness".

In counsel's experience, the statements and reports of Government witnesses are replete with hearsay, innuendo and suspicion and are so known to be to most defense counsel. Consequently they would be more than hesitant to ask for and make use of such statements and reports

on cross-examination. Obviously, if the Government contention were to be adopted by the courts, it would be tantamount to a repealer by judicial fiat of Section 3500.

In *Palermo* v. *United States*, 360 U. S. 343, 345, this Court stated:

> ". . . this court . . . in Jencks v. United States, 353 U. S. 657, decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to Government agents by Government witnesses."

This Court further stated at page 349 of the Official Reporter:

> "This Section [Title 18, U. S. C., Section 3500 (a)] manifests the general statutory aim to restrict the use of such statements to impeachment".

It is respectfully submitted therefore that the instant decision of the Court of Appeals is contrary to the opinion of this Court as to the purposes and effect of Title 18, U. S. C., Section 3500, as set forth in the *Palermo* case and that this matter therefore compellingly demands consideration by this Court. At the very least, the Court of Appeals decision has enunciated a severe restriction upon the ameliorative purposes of Section 3500 which has not been, but should be, reviewed by this Court.

The Court of Appeals decision is additionally in conflict with application decisions of the Fifth Circut and Tenth Crcuit with respect to the admission of post-conspiracy statements where the declarant himself is not on trial. It is well established that a statement made after the termination of a conspiracy and not in furtherance of its objects is admissible, if at all, only against the declarant himself. (*Delli Paoli* v. *United States*, 352 U. S. 232, 237; *Krulewitch* v. *United States*, 336 U. S. 440.)

In the instant case, Battaglia had pleaded guilty prior to trial and was not on trial with the petitioners. In the case of *Seeman* v. *United States*, 90 F. 2d 88, the Court of Appeals for the Fifth Circuit held that where the declarant himself is not on trial his post-conspiracy statements are not admissible for any purpose.

The Court of Appeals for the Tenth Circuit, in the case of *Holt* v. *United States*, 94 F. 2d 90, held to the same effect.

The instant decision of the Court of Appeals is, therefore, directly in conflict with the said decisions of the said Circuits and, therefore warrants review by this Court.

The testimony contained in the portions of the post-conspiracy statements which the Government read to the jury in the instant case, was substantially identical to prior testimony which Battaglia had given on direct examination (R. 177-185). In admitting the said post-conspiracy statements into evidence, the Trial Court thus permitted prior consistent statements of the witness to be used against the petitioners. This ruling is in conflict with the holdings of the Fourth Circuit in *Dowdy* v. *United States*, 46 F. 2d 417, and the Third Circuit in *United States* v. *Toner*, 173 F. 2d 140. In both those cases the Court of Appeal for the said respective Circuits held it to be reversible error to admit post-conspiracy statements of a witness which corroborated his prior direct testimony. The ruling of the Court of Appeals in the instant case is thus in direct conflict with applicable decisions of the Fourth and Third Circuits on the same matter and should, therefore, be reviewed by this Court.

Further, it cannot be said that the admission of such prior consistent statements was permissible under the rule enunciated in *Di Carlo* v. *United States*, 2 Cir., 6 F. 2d 364, inasmuch as the witness made both statements subsequent to his arrest and at a time when it cannot be said that he was without motive to fabricate.

Indeed, the corroborative purpose of the Government's action in reading the said portions of the post-conspiracy statements to the jury, was clearly demonstrated when at the conclusion thereof, the prosecution asked the witness if he had ever previously been shown either of the said statements. Over objection by defense counsel, the witness was permitted to answer that he had not (R. 573).

As hereinabove stated, the Government case rested almost exclusively upon the testimony of Battaglia and Guarna. Both were awaiting sentencing subsequent to the outcome of the instant trial and Battaglia had an application for a visa for permanent residence in this country pending, upon which action was also awaiting the outcome of the instant trial (R. 472, 473).

Their testimony contained numerous material contradictions and inconsistencies and their interest in the outcome of the trial was apparent. Under such circumstances this Court in the case of *Berger* v. *United States*, 295 U. S. 78, 89 characterized the case against petitioners as "weak". (See also *United States* v. *Donnelly*, 7 Cir., 179 F. 2d 227, 233.)

It cannot with reasonable certainty be said that but for the erroneous admission of the post-conspiracy statements a verdict of acquittal would not have been returned by the jury and therefore, the error must be considered to have been prejudicial. *Kotteakos* v. *United States*, 328 U. S. 750; *Bihn* v. *United States*, 328 U. S. 633; *United States* v. *Kelinson*, 2 Cir., 205 F. 2d 600.

QUESTION NO. 2

Whether the trial court committed prejudicial and reversible error in failing to rule, as a matter of law, that petitioner Danis had withdrawn from the conspiracy at the time of his transfer to Idlewild Airport.

It is submitted that upon petitioner Danis' transfer from waterfront duty to Idlewild Airport in May, 1955, his connection with any conspiracy proved by the Govern-

ment, terminated. In consequence, evidence of any acts or conversations of the other defendants named in count twenty-seven (the conspiracy count) subsequent to that date, was inadmissible. Counsel for petitioner Danis made timely and repeated objections when the Government sought to introduce evidence of such acts and conversations, which were overruled by the Court (R. 113, 129-130a).

It is established that withdrawal from a conspiracy just as conspiracy itself, may be proved by circumstantial evidence. *Buhler* v. *United States*, 9 Cir., 33 F. 2d 382, 384; *Marino* v. *United States*, 9 Cir., 91 F. 2d 691, 698.

In the instant case, Battaglia, one of the two principal Government witnesses and the person whose merchandise was allegedly being smuggled into this country by petitioner Danis, unequivocally stated that "he [Danis] was not any more with us. I never saw anymore Mr. Danis because he went to the airport to work with the airport" (R. 418). Such an affirmative statement by Battaglia, which was not contradicted or qualified in any way by Guarna or any other witness, was ample proof of his withdrawal from the alleged conspiracy and warranted such a ruling by the trial court.

There was no showing that the Longhi arrival or the one subsequent visit by petitioner Danis to the importers' office, was in any way connected with the conspiracy charged. Indeed, Guarna admitted that there was no intention to smuggle in connection with the Longhi arrival (R. 1624-1632).

In the case of *Yokely* v. *United States*, 9 Cir., 237 F. 2d 455, the Court considered the effect of post-conspiracy statements on the time of termination of the conspiracy charged. On the proposition of whether the trial court should decide the question of termination as a matter of law or leave it to the jury for determination as a matter of fact, it held that an instruction, almost in the same language as that given by the court in the instant case (R. 3155), was reversible error, and stated at page 458:

"We add that the instructions given by the trial court did not cure the prejudicial admission. The government wanted it left to the jury to determine whether or not the conspiracy had ended. We are of the opinion that the government in the instant case can not circumvent the dangers of allowing such hearsay statements to go into evidence by merely alleging that it was a question for the jury as to when the conspiracy ended, and should the jury determine that the conspiracy ended before the statement was made then they should disregard the effect of the statement as to the other conspirator and confine its use solely to determining the guilt of the declarant . . ."

The trial court in the instant case, however, followed precisely the procedure which was proscribed by the Court of Appeals in the *Yokely* case. It is thus submitted that there is a conflict between an applicable decision of the Ninth Circuit and the Court of Appeals decision herein, on the same matter, which should be reviewed by this Court.

CONCLUSION

For the reasons stated in this petition it is respectfully submitted that the application for a Writ of Certiorari should be granted.

Dated: New York, New York, April 20th, 1960.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 269—October Term, 1959.

(Argued February 11, 1960 Decided March 23, 1960.)

Docket No. 25999

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM LEV and BENJAMIN DANIS,

Defendants-Appellants,

—and—

ARTHUR B. MANDEL, THEODORE RIDER, JOSEPH COHEN, ROBERT S. ROSENBERG, GIUSEPPE BATTAGLIA and DOMENICO GUARNA,

Defendants.

Before:

MOORE, *Circuit Judge,* and
SMITH and HERLANDS, *District Judges.*

After a jury trial in the United States District Court for the Southern District of New York, Hon. George H. Boldt, *J.* (District Judge for the Western District of Wash-

ington, sitting by designation), appellants William Lev and Benjamin Danis were convicted of having violated 18 U. S. C. 213, 545 and 371.[1] Affirmed.

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[1] Sec. 213. Acceptance or demand by customs officer or employee.

Whoever, being an officer or employee of the United States, solicits, demands, exacts, or receives from any person, directly or indirectly, except in payment of the duties or exactions fixed by law, any gratuity, money, or thing of value, for any service performed under the customs laws, or in consideration of any official act or the omission thereof, in connection with or pertaining to the importation, entry, inspection or examination, or appraisement of merchandise or baggage, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Evidence, satisfactory to the court, of such soliciting, demanding, exacting, or receiving shall be prima facie evidence that the same was contrary to law.

Sec. 545. Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appendix

ROBERT B. FISKE, JR., Asst. U. S. Attorney, So. District of New York (S. Hazard Gillespie, Jr., U. S. Attorney for the So. District of New York and David P. Bicks, Asst. U. S. Attorney, of counsel), *for appellee.*

LEON B. SAVETSKY, New York, N. Y. (Charles Spar, New York, of counsel), *for defendant-appellant Lev.*

HENRY K. CHAPMAN, New York, N. Y. (Murray E. Gottesman, on the brief), *for defendant-appellant Danis.*

SMITH, *District Judge:*

Appellants Lev and Danis, Customs Inspectors of the United States Customs Service, were convicted in the Southern District of New York on trial to the jury, Judge Boldt presiding, of conspiracy with one Guarna, one Battagila, and others unknown, to defraud the United States of free and incorrupt operation of the Customs Service by smuggling merchandise into the United States. Lev was also convicted on 21 substantive counts of soliciting or receiving bribes or smuggling; Danis on 4 substantive counts, 3 of soliciting or receiving bribes and one of smuggling. Each appellant was sentenced to 3 years imprisonment and $2500 fine on the conspiracy count, and 2 years imprisonment on each of the substantive counts, all sentences of imprisonment to be served concurrently.

The indictment, filed on April 15, 1958, contained 31 counts, charging four separate types of offenses.

Ten counts charged appellants Lev or Danis, together with defendants Giuseppe Battaglia and Domenico Guarna, with smuggling merchandise into the United States in violation of Title 18, Section 545, United States Code. (Counts

3, 5, 7, 10, 12, 15, 18, 20, 22 and 24.) Danis was named in Count 3; Lev was named in the remaining counts. In addition four other former customs inspectors, Theodore Rider, Arthur Mandel, Joseph Cohen and Robert Rosenberg, were named as defendants in Counts 7, 12, 15 and 18, respectively.

Fourteen counts charged the defendant Customs inspectors with soliciting, demanding and receiving monies and merchandise in consideration of services performed and omitted in connection with the examination of baggage under the Customs laws in violation of Title 18, Section 213, United States Code. (Counts 1, 2, 4, 6, 8, 9, 11, 13, 14, 16, 17, 19, 21, 23.) Danis was named in Counts 1, 2 and 4. Lev was named in Counts 2, 4, 6, 8, 11, 13, 14, 16, 17, 19, 21 and 23. Rider was named in Count 9; Mandel was named in Count 13; Cohen was named in Count 17. Rosenberg was not named in any of these counts.

In addition to the substantive counts, the indictment contained five separate conspiracy counts, each charging a continuing conspiracy to violate the Customs laws through acts of smuggling and bribery in violation of Title 18, Section 371, United States Code (Counts 27-31). Count 27 named as defendants Lev, Danis, Battaglia and Guarna, and as co-conspirators "divers other persons to the Grand Jury unknown." Counts 28 through 31 charged as defendants Rider, Mandel, Cohen and Rosenberg, respectively, each defendant being named alone in a separate count. Each of these four counts charged as co-conspirators Lev, Danis, Battaglia and Guarna and "divers other persons to the Grand Jury unknown."

The remaining two counts, Counts 25 and 26, charged Lev and Mandel, respectively, with receiving, concealing and facilitating the transportation and concealment of a quantity of distilled spirits, knowing the same to have been imported into the United States contrary to law in violation

of Title 18, Section 545, United States Code. These counts were severed prior to trial and were subsequently dismissed.

Prior to trial, defendants Mandel, Rider, Rosenberg and Cohen and appellant Danis moved for a severance of their trials from that of appellant Lev. The motion was denied as to Danis and was granted as to the remaining defendants. Also prior to trial, defendants Battaglia and Guarna entered pleas of guilty to all counts in which they were named, and thereafter testified for the Government.

The trial of appellants Lev and Danis began on September 28, 1959 and was concluded on October 24, 1959. Both were found guilty on all counts in which they were named. Immediately following the Lev-Danis trial, defendants Mandel, Rider, Rosenberg and Cohen were tried together before Judge Boldt without a jury. This trial began on October 24, 1959 and was concluded on October 27, 1959. Mandel, Rider and Rosenberg were convicted on the substantive counts in which they were named, and were acquitted on the conspiracy counts. Cohen was acquitted on all counts in which he was named. Lev and Danis appeal.

Battaglia and Guarna were salesmen and importers of neckwear and other merchandise from Italy. Their testimony, if believed, established that in January 1954 Danis proposed an arrangement for smuggling merchandise into New York, the savings in duty to be split 50-50. Lev was brought into the arrangement a few days after its inception, the proposal being repeated to Battaglia and Guarna by Danis in Lev's presence. Gifts of merchandise and payments of money to Danis in Lev's presence were made following the first smuggling operation, of a quantity of samples, in January 1955. Danis then told Battaglia and Guarna that he was being transferred to Idlewild, and that they could bring everything to the airport. From that point on, Lev was the contact at the dock. Lev later, in December

1955, at Guarna's request, arranged for Danis to take care of one Longhi. Due to arrive by plane, Longhi's plane was, however, re-routed to Philadelphia. On two occasions shortly thereafter Danis came to Guarna's office and received two or three ties. Thereafter, Inspectors Lev, Rider, Mandel, Cohen, Farber, Goodman and Rosenberg, all passed merchandise of Battaglia and Guarna on the piers without payment of duty, Lev a number of times. Lev, Rider, Mandel and Cohen received payments from Guarna, and Lev received payments ostensibly for Farber, Goodman and Rosenberg.

Danis assigns as error the refusal of the court to rule as a matter of law that he had withdrawn from the conspiracy at the time of his transfer from the docks to Idlewild Airport. The ruling is clearly correct. Not only is there no evidence of an unequivocal act of withdrawal, but there is evidence showing continued willingness to participate in the smuggling by adding the airport as an additional smuggling channel. Battaglia did state that Danis was "out of the picture" because he was already at the airport. This is not conclusive on the question of withdrawal, but was properly left for the jury's consideration along with the other evidence in the case, including the abortive attempt to clear Longhi at the airport, and Danis' continued receipt of ties from Guarna.

Both appellants assign as error the admission against them of the acts and declarations of defendants Mandel, Rider, Cohen and Rosenberg, although Count 27 did not name them as co-conspirators, naming Guarna, Battaglia, Lev and Danis and alleging conspiracy with "divers other persons to the grand jury unknown." Even if the co-defendants cannot properly be termed "other persons unknown" and even if they did not knowingly participate in a conspiracy with Lev and Danis, the proof showed that they acted under instructions given by Lev in the carrying out

of the conspiracy, and were therefore agents of the conspirators in the course of the conspiracy, so that their acts and declarations in so carrying out the conspiracy were admissible against the conspirators Lev and Danis. *United States* v. *Miller*, 2 Cir., 246 F. 2d 486, 490 n. 10, certiorari denied 355 U. S. 905; *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497. *4 Wigmore, Evidence*, 3rd Ed., Secs. 1078, 1079.

Counsel for appellant Lev, in cross-examining Battaglia, read questions and answers from Government's Exhibits for Identification 12 and 13. 12 for identification was a statement of Battaglia taken October 16, 1957 at the office of the supervising Customs Agent; 13 for identification, a supplemental statement of Battaglia taken November 21, 1957 at the same place. The portions of the exhibits read by counsel for Lev from Exhibit 12 for identification were as indicated in Appendix A to this opinion.

Battaglia was cross-examined as to the accuracy and explanation of the quotations. Likewise as to quotations from Exhibit 13 for identification (Appendix B).

Counsel for appellant Danis, in cross-examining Battaglia, read from Exhibit 12 for identification (Appendix C).

On redirect examination, over objection by appellants' counsel, counsel for the government was permitted to make use of Exhibits 12 and 13 for identification (Appendix D).

The rulings of the court permitting the limited use of the extra judicial statements, not in evidence, are clearly correct. It is of course true, as appellants contend, that prior consistent statements are ordinarily not admissible on redirect for the purpose of rehabilitating the credit of a witness. *2 Wigmore, Evidence*, 3rd Ed., Sec. 1125, *Toner* v. *United States*, 3 Cir., 173 F. 2d 140. And a post-conspira-

torial statement by a co-conspirator is no part of the conspiracy itself and is not admissible as such against his co-conspirators. *Krulewitch* v. *United States*, 336 U. S. 440. In the case at bar, however, the appellants had used portions of the statements on cross-examination and the questions referring to the portions used by the government over objection were offered and admitted solely to round out and complete the quotations on which appellants had based the questions on cross-examination. Carefully so limited, such a use may be necessary to place in context and make more understandable to the jury the portions quoted by the defense and is permissible for that purpose even though it may also serve in some degree to rehabilitate the witness. Under the limitations imposed, the use permitted by the court was proper. See *Wigmore, Evidence* 3rd Ed. 1940, Sec. 2113, pp. 526-7. *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, 422, certiorari denied 355 U. S. 831, *Affronti* v. *United States*, 8 Cir., 145 F. 2d 3.

The judgments of conviction of Lev and Danis are in all respects affirmed.

APPENDIX A

"Q. After you left the United States, in the summer of 1954, when did you return again? A. In December 1954. (Off the record in Italian with Mr. Guarna.)

Q. You stated before that you received Inspector Danis in your office twice, once alone and once with Inspector Lev. When did the second of these visits (415) occur? A. A few days after the first.

Q. And what brought about this visit? A. They want to talk about this matter, to import something without any declaration.

Q. Did Inspector Lev also tell you that you could bring merchandise into the United States without declaring it and without paying duty? A. Yes, yes, yes.

Q. And was Inspector Lev's proposition also discussed between yourself and your partner? A. Yes.

Q. And was it also a factor in your decision to try to do something about it? A. Not right away. With time, later on, we decided to import samples.

Q. After the second visit of Inspector Danis, at which time he brought Inspector Lev, did you leave New York and travel about the country seeking orders? A. Yes, sir.

Q. And did you ask Inspector Danis and Inspector Lev to in the future contact your partner instead of yourself? A. We didn't have a chance to ask anything, because he was handling those people.

Q. But Mr. Guarna was available in New York in case they came again and you were not? A. Yes. I was not. On the occasion when I had the meeting with Bill, I asked Bill 'I want to know from you if something goes wrong, what happen?' because I want to know how much profit I can have, how much from the other side would be the risk, the danger"—

Mr. Fiske: "could be the risk."

—"could be the risk, the danger. He told me—his exact words—'Don't worry.' The maximum that could happen, we pay the duty. You understand? I knew the maximum could happen was to pay the duty. To pay the duty, the maximum.

Q. Mr. Battaglia, do you recall what vessel brought you to the United States in December, 1954? A. It was—I cannot remember. It was the Andrea Doria or the Cristoforo Colombo.

Q. And what class did you travel? A. First class.

Q. What occurred when you came off the ship and went on to the pier? A. What happen? Some of these two people, either one, I don't remember,—there was one other sent from them. They checked my bags and they let me go out.

Q. Was Mr. Guarna waiting to meet you? A. No.

Q. Were both these inspectors present at that time? A. I don't remember.

Q. Following the time you left the pier with your bags and your samples were cleared without paying duty, did you receive a further visit from either Inspector Danis or Inspector Lev at the office? A. Yes, some of them came to the office.

Q. Who came? A. I think it was Bill.

Q. Did anyone else come? A. I don't remember.

Q. Did you pay Bill any money for having cleared your samples? A. Either 100 or $150."

APPENDIX B

"Q. —this refers, this is not part of my quotation, this refers, Mr. Battaglia, to events that occurred after Inspector Rosenberg had cleared baggage at the Port of New York, so that you are not misled by me in any way.

Q. Did you have any conversation at all with (457) Inspector Rosenberg? A. No, no.

Q. What was the approximate amount of merchandise you had with you on that occasion which was undeclared? A. Between eight and ten thousand dollars.

Q. Prior to this occasion, Mr. Battaglia, had you ever seen Inspector Rosenberg? A. No.

Q. After he cleared your baggage and you left the pier, did you ever see him again? A. I don't think so.

Q. Did he come to your office? A. I don't think so.

Q. Do you believe that Inspector Rosenberg was paid for what he did in clearing your baggage? A. I think so.

Q. How was he paid? A. From Mr. Lev.

Q. Does that mean that because of this arrival Inspector Lev was paid? A. Oh, sure, he was paid.

Q. When and where did that happen? A. As usual, I think it was paid in the office from Mr. Guarna.

Q. And how much was he paid? —and I am referring now, of course, to any payments made by Mr. Guarna to Mr. Lev— A. As far as I know, he should have been paid either five or six hundred dollars.

Q. How do you know this, Mr. Battaglia? A. Because I was paying $250 or $300 for my share, or Mr. Guarna was getting $500 or $600 from Battaglia & Guarna.

Q. That means that in connection with this very arrival Mr. Guarna charged the company the $500 or $600? A. Yes.

Q. Or charged you $250 or $300, as your one-half share? A. Yes.

Q. However, you were not present, were you, when Mr. Guarna gave Inspector Lev the $500 or $600? A. When he gave the five or six hundred dollars I was never present.

Q. So that you knew this only because Mr. Guarna told you? A. At the beginning, when we made the small payment, like Danis or Bill, to begin with, it was $100 or $150; that was done in my presence. When the amount went up I was never there. If I was there in the office I went to another room, because, as I told you, I don't have too much to say with these nice people."

APPENDIX C

"Q. Was the fact that some of your customers in the United States wished to have the merchandise delivered to them clear of Customs one of the reasons why you decided to accept the inspectors' proposition and bring merchandise? A. No.

Q. What was the reason why you decided to do this? A. Because since 1955, as we went to buy or sell in the beach shoes business (544) and we started losing a lot of money, we were in a position that we should do something to survive, because with the beach shoes we lost money, thousands dollars, and the expenses were so high between office, our traveling, our employee, and because we lost $5000 with one employee we had who stole us merchandise, money, I was obliged to arrange with Mr. Guarna to make some extra money importing merchandise without paying any duty

Q. What was the approximate value of these samples? A. I tell you the truth, I don't remember, but I knew it was perhaps $500.

Q. What occurred when you came off the ship and went on to the pier? A. What happen? Some of those two

people, either one, I don't remember,—there was one other sent from them. They checked my bags and they let me go out.

Q. Was Mr. Guarna waiting to meet you? A. No.

Q. Were both these inspectors present at that time? A. I don't remember.

Q. Were your bags examined by any inspector? A. At that time, they didn't open the bags, because as far as I can remember last year they say there was a law—they were obliged to open all bags, but in the past that was not this condition.

Q. Following the time you left the pier with your bags and your samples were cleared without paying duty; did you receive a further visit from either Inspector Danis or Inspector Lev at the office? A. Yes, some of them came to the office.

Q. Who came? A. I think it was Bill.

Q. Did anyone else come? A. I don't remember.

Q. Did you pay Bill any money for having cleared your samples? A. Either $100 or $150.

Q. But on this occasion the money you gave Mr. Lev was for himself rather than for both himself and Mr. Rider? A. Because for me—let's say legally, he was the leader of this situation, who was—we were dealing with him.

Q. Your declaration indicates that the automobile was inspected and passed by Inspector Napolitano. Do you know this man? A. I remember the man vaguely. Vaguely.

Q. By name? A. Not by name.

Q. Did you give him anything at all for passing (561) the cheese? A. I don't remember. Usually I give something to everybody, even when they don't do anything to me. But I don't remember. Right now I don't remember."

APPENDIX D

Q. Mr. Battaglia, just a minute ago on your direct examination Mr. Gottesman read you some questions—

Mr. Spar: Cross.

Q. I am sorry. —on cross Mr. Gottesman read you some questions and answers from the statement which you had given to the Customs agents on November 21, 1957, which is Government's Exhibit 13 for identification.

Referring to page 6 I would like to read you—

Mr. Gottesman: The reporter has my copy, if your Honor pleases.

Mr. Spar: He has my copy, too.

The Court: The court reporter has it?

Mr. Spar: Yes.

The Court: Show them what you propose to read.

Mr. Fiske: Page 6 of the statement of November 21, 1957.

The Court: Some additional material that you propose to call to his attention?

Mr. Fiske: Yes, your Honor.

The Court: In connection with matters previously read?

(568) Mr. Fiske: That is exactly it.

Mr. Gottesman: Which ones are you going to read?

(Counsel confer.)

The Court: All right, Mr. Fiske. You propose now to read some additional material in the same statement which you consider as bearing on the matters covered in cross?

Mr. Fiske: Yes, your Honor.

The Court: All right, do it.

Mr. Gottesman: We object to that your Honor, on the ground that it is not proper redirect examination.

The Court: Overruled. He may do this. Go ahead.

Q. Mr. Battaglia, to save time I will tell you this refers to the time when you came in in December, 1955.

Mr. Gottesman: Then we object to it, your Honor. It is in no way binding on the defendant Danis.

The Court: Objection overruled. Go ahead.

Q. "Q. And did you pay Inspector Lev? A. Mr. Guarna paid Inspector Lev.

"Q. How much did he pay him? (569) A. I think $300, because as far as I remember was not that important, the entrance of merchandise.

"Q. Did you offer Inspector Rider or Inspector Lev any reason why you paid them each separately? A. I paid something to Mr. Rider because for me who did the work was Mr. Rider. And I did not know how much he was going to get from Lev, because I had an impression that that occasion, any other occasion Mr. Lev, when he didn't do everything by himself, he was getting for him most of the money."

Do you remember being asked those questions and giving those answers? A. Yes, I remember those questions.

Q. Also, Mr. Battaglia, on your cross-examination by Mr. Spar you were asked certain questions and gave certain answers relating to the statement which you gave on October 16, 1957, relating to the time when you came in in December, 1956, a year later, and I would like to read you further questions and answers relating to that same transaction and ask you whether or not you were asked these questions and gave these answers. This is starting at page 21.

The Court: Same objection, same ruling.

Q. "Q. Will you tell me what the circumstances (570) were on December 8, 1956, when you offered your baggage for inspection? A. I went on the pier, under my letter, waiting for my bags, and then I spoke with Mr. Guarna and I told him to make sure that the thing could be done, because I didn't see Bill over there. And then Mr. Guarna showed me which one was the man who was going to make the operation for me. He told me which one was the man, first, that was going to make the operation, and then when I saw the man was behaving with me like I was any customer, you know—he didn't let me understand that he was helping me, so I started to worry, and I told him (Guarna) 'Call Bill, otherwise I will declare everything.' Then Bill came and he told me 'Don't worry,' this man was dealing with us. But still the man told me that I was obliged to open everything, which surprised me, because when I opened everything right away everybody could see what kind of merchandise it was in the trunks, and I was more worrying, because I somehow saw something around that I never saw before, and then I asked what was going on there; they told me they were looking for somebody else under my letter 'B'—they were checking for drugs, narcotics or something like this. And Bill (571) insists to me 'Don't worry, everything is all right.' So we close all the trunks, we put everything on the truck, we went away. This is as it happened.

"Q. Did you say anything to Inspector Rosenberg about declaring the merchandise? A. No, I didn't say anything, because I was worrying I have wrong—as far as he was—He knew about it. And some time it seemed to me he did not know anything but he was doing a favor to Mr. Lev.

"Q. However, he did open the trunks which had the merchandise, didn't he? A. Yes. All the trunks were opened. All of them.

"Q. And was it obvious from just what could be seen on top of the trunks that there was merchandise? A. Yes;

because the trunks, they were given us from the manufacturer just like they should arrive declared; nothing was hiding the merchandise, you understand? This proves too that the Galliene was in good faith; otherwise we could take all the''—

I will omit the rest of that answer because it doesn't relate to the particular subject.

"Q. Was this the same type trunk as came in on October 1, 1957?''

Mr. Gottesman: Just a moment. If your Honor pleases, I have sat here very patiently. Are we going to read this entire transcript?

The Court: I realize that it is difficult sometimes to pick out the particular thing without getting it out of context, but don't read unnecessary repetition, Mr. Fiske.

Mr. Fiske: I will abide by your Honor's ruling. I will state what I had planned to do and perhaps your Honor could rule in advance and save some time, if you wish.

The Court: All right.

Mr. Fiske: Mr. Spar had read some questions and answers relating to this particular examination and I had planned to read the entire questions and answers relating to it which run on another two pages.

Mr. Spar: I submit—

The Court: What would be the purport of doing that?

Mr. Fiske: The purport of it, your Honor, is under the doctrine of completeness, I believe, when something is read on the subject we are entitled to read in everything that was said on the same subject.

The Court: Yes, but there be any suggestion that there was some reference to something in this other material that counsel inferred was not covered or something, you can pick that out and read it but otherwise

I don't want you to read the whole thing in blind adherence to a rule of completeness.

Mr. Fiske: All right, your Honor, I will accept your ruling and I won't go any further.

The Court: All right.

By Mr. Fiske:

Q. Incidentally, Mr. Battaglia, did anyone ever show you either of these statements—

Mr. Gottesman: Just a minute. Objected to. That is certainly not proper redirect.

The Court: I think it is. Overruled.

Q. Did anyone ever show you, Mr. Battaglia, either of these statements, Government's Exhibits 12 or 13 for identification, that you have been questioned about? A. The only paper I saw was the copy of the indictment.

Mr. Fiske: Thank you.

The Court: Any recross?

Mr. Fiske: I have some more questions.

Mr. Gottesman: May I state for the record (574) the purpose of our objection to the last question is that nobody has for one instance asked this gentleman any questions as to whether he had read these things or it had been read to him.

The Court: I still think it was appropriate on redirect.

Mr. Spar: May I at this time, if the Court please, with the stenographer and counsel, approach the side bar?

The Court: Yes.

(The following occurred at the bench, not in the hearing of the jury:)

Mr. Spar: If your Honor pleases, at this time, on behalf of the defendant Lev, I respectfully move for a mistrial by withdrawal of a juror on the ground that the United States

attorney has severely prejudiced the rights of the defendant Lev in standing up before the jury and reading from a record not in evidence and not just reading question and answer without asking the witness any questions as to whether they were made. They were improper redirect questions. It was an attempt to inflame the jury on the basis of a statement that is not in evidence, and I say to your Honor that the defendant Lev has been sorely (575) prejudiced by the conduct of counsel.

The Court: Motion denied and exception allowed.

Mr. Gottesman: The defendant Danis joins and on an additional ground, on the ground that those questions are so highly prejudicial in view of the fact that the witness on his own testimony has conceded he never saw the defendant Danis again after the middle of January, 1955.

The Court: That motion likewise is denied and an exception allowed. I can only say that it seems to me that the redirect examination is merely adding additional portions of data that were read to the witness on cross even though that document was not in evidence at the time, and it seems to me to be only fair matter to add such portion of the man's statement at that time as seem to bear on the same subject matter. The motions are denied and exception allowed.

(Proceedings were resumed within the hearing of the jury as follows:)

By Mr. Fiske:

Q. Mr. Battaglia, going back to the material I just read to you from Exhibit 12 for identification relating to the events of December, 1956, let me ask (576) you whether or not you were asked those questions and gave those answers that I have read to you?

Mr. Spar: Objection, your Honor.

The Court: Overruled. He may answer. The question now is were the questions put and the answers given that Mr. Fiske has read you from the same statement.

A. Yes, I think so.